

Polish Labour Law After the Accession to the European Union

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Examining the Polish labour law against the background of the Community law requires a different approach after Poland's accession to the European Union than before; instead of the "approximation" of legislation, as stated in the Association Agreement of 16 December 1991, the subject of interest now (or at least the starting point for research) is the relation of our law to the European Union one.¹ It prompts one to isolate three groups of regulations within the system of labour law in Poland (and other member states), differing from each other first and foremost as far as their origin is concerned. These are: 1) Community regulations of direct application in the member states, including certain normative dispositions present in the primary legislation acts and in the ordinances (assuming that these regulations are sufficiently precise and unconditional); 2) regulations (legal acts) enacted by the legislative bodies of Poland as a member state, but whose issuing stems from the Community law (directives) and which are, to a greater or lesser extent, a fulfillment of the Community law; and 3) regulations enacted autonomically by the Polish lawmakers, beyond the area of the Community law's rule. In the observations concerning all three groups of regulations, the legal situation as of 1 May 2004 will be taken into account.

The first group of regulations, which directly "enter" the internal legal order of a member state (but do not belong to national law²) and are the sole regulator of social relations in a given area, has a very narrow application in the field of labour law. They regulate for instance: the principle of equal pay for men and women for an equal amount or type of work or the issue of people (EU citizens) moving to another EU member state in order to work there within the framework of labour relations ("flow of workers"). It has to be mentioned here, however, that the principle of equal pay regardless of the sex has already been in force in Poland since 2001 (it was introduced by the Polish lawmakers during the harmonisation process on the basis of the Association Agreement). On the other hand, the situation concerning the "flow of workers" is *quite* different. The validity of these regulations in Poland is temporarily suspended in relation to a great majority of the "old" EU member states (it does not concern only the UK, Ireland and Sweden) because of the establishment of the transitional period (maximally a 7-year long one).³ Thus, with time, while systematically withdrawing from the transitional period restrictions, the application of the above mentioned regulations will be expanded.⁴

Let me now move on to comment shortly on the third group of regulations, and only subsequently devote more attention to the second group, which is the most significant one as far as labour law is concerned.

The range of Community labour law (included in the "primary legislation" acts, ordinances and directives) is narrower than the range of labour law which is binding in the particular member states. The reasons behind it are connected with the fact that the European Community, and then the European Union, have not been equipped with a general competence norm allowing to create laws in this area and, thus, the legislative activities of the EU bodies are subject to the rules of the principle of subsidiarity, which means that they should not create new laws if satisfactory results can be arrived at, taking into account the lawmaking role of social partners, on the way of enactment of national law in the member states.⁵ Presently, Community labour law does not regulate numerous issues falling into the category of individual and group labour law. It concerns, for instance, almost the entire matter of cessation of the employment relationship (apart from group dismissals), including the rights one is entitled to in case of a faulty dissolution of employment contract, responsibility for an inappropriate way of carrying out or not carrying out one's duties or resolution of individual labour disputes. By means of clearly stated regulations, the following competences have been ex-

cluded from the legislative competences of the Community bodies: setting the standards concerning remunerations⁶, associations of employees and employers, right to strike and right to lock out. Exclusion of the right to strike and the right to lock out from the Community level legislative competences in effect affects the entire area of group labour disputes. In all those areas that are not covered by the Community law, the national lawmakers decide about law enactment. And although their autonomy may in some cases be restricted because of the general obligation to respect the basic principles of Community law⁷ in the process of law enactment, the restrictions are hardly of any significance here.

It should be mentioned here that the range of labour laws enacted by the national lawmakers on the basis of the autonomy principle will be seriously narrowed down if the Charter of Fundamental Rights of the European Union, adopted by the European Council in December 2000 in Nice, comes into force together with the Constitutional Treaty it forms part of (part II). This is because the Charter formulates laws which are not included or are included only partially within the framework of the currently valid Community regulations. The following deserve a special mention here: the right of an employee to be protected against unfair dismissal (art. 30 of the Charter), the right to associate in trade unions (both employees and employers trade unions) for the protection of one's interests (art. 12) and the right to group negotiations and, in case of a conflict of interests, group actions (art. 28). It is worth mentioning that art. 28, in its part concerning the group actions, names only the right to strike *expressis verbis*. However, the regulation will undoubtedly become the basis of the right to lock-out as well (similarly to item 4 of art. 6 of the European Social Charter⁸).

The second group of regulations constitutes the core part of labour law. It is the most extensive one and it concerns almost all of the most significant areas of this field of law. Community directives, which are the causative factor of regulations here, fulfil the so called function of harmonisation of the member states' legal systems. A directive establishes the goal, and determines its significant elements, recognising it as an essential task to be realised from the point of view of the Community's interests. As far as labour law is concerned, the task, or at least most of its elements, has the nature of a standard protecting the employees. The member states are left with the right to choose a particular way of implementing the arrangements of a given directive, but they can also, taking into account the internal circumstances, independently (though within the limits set by the directive) regulate the elements of the task and complement the regulations with additional dispositions, having in mind the internal *realia*. Naturally, these cannot conflict with the task set by the directive. The whole process testifies to the servient role of the directives in the realisation of the fundamental idea of European integration, that of unity in diversity.

Let us be reminded of the following Community regulations that have the legal character of a directive: ban on discrimination against job applicants and current employees; obligation to inform the employees about the significant elements of labour relations; regulation concerning working time and holiday; labour protection (in a broad sense of it, including the employees' safety and health protection, protection of women in connection with the maternity issues and protection of juvenile workers); regulation concerning the maternity leave; regulation concerning the change of employer by means of a transfer of a company or part of a company; regulation concerning group dismissals; protection of the employees' receivables in case of the employer's insolvency; regulations concerning part-time employment, temporary employment, fixed-term employment, working conditions of the employees delegated to work in another member state within the framework of the services supplied; regulation concerning informing (and consulting) the employees of a Community-range enterprise about the recognition of qualifications. The Community directives have been transposed into the Polish labour law on the basis of the above mentioned Association Agreement, although some of the implementation regulations (e.g. act of 5 April, 2002, about the European company boards) came into force only when Poland became a European Union member state⁹.

When reading the Polish regulations concerning the matters covered by the EU directives, one is likely to notice certain shortcomings in the reception of the Community law. And I do not refer here to the fact that the Polish lawmakers decided not to apply some of the Community solutions which are of non-imperative character in order to adapt the labour law to the current reality better. Thus, for instance, it was acceptable to resign from the obligation to inform an employee about some of the less significant elements of labour relations in case of casual and temporary (of up to one month's duration) employment or when the working time amounts to less than 8 hours a week. It was also justifiable to resign from treating the daily working time norm, totalling 8 hours, as a rule¹⁰. Neither do I mean the technical and legislative shortcomings, affecting for instance the Polish non-discrimination regulations (a striking excess of text), or the introduction of terms and concepts alien to the Polish labour law (mobbing). What I would like to refer to are the content-related shortcomings, resulting from the lack of compliance of a Polish regulation implementing a certain directive with the imperative part of the very directive in question.

Such shortcomings are for instance to be observed in our regulations implementing directives concerning: group dismissals, change of employer through transfer of enterprise (or part of it) and fixed-term employment (for a defined period of time). Because of the limited volume of this paper, I will proceed to discuss only the most important of the above mentioned shortcomings.

In the group dismissals act (of 13 March, 2003, defining the special principles of the dissolution of employment contract stemming from reasons which do not concern the employees), a regulation which is to be considered as significantly non compliant with the appropriate disposition of the related directive is the one concerning the inclusion into the number of people constituting the defining element of a group dismissal (art. 1, item 2 of the act) of persons with whom labour relations are terminated on the basis of agreement of the parties (but on the employer's initiative and for reasons not concerning the employee) only when the number of employees leaving the company according to procedures other than dismissal at notice is five or more. The directive, on the other hand, (art. 1, item 1, par. 2) includes the limit of five employees in a different context, naming them as those dismissed at notice by the employer. In other words, according to the directive, for a group dismissal to take place, there have to be at least five employees dismissed at notice by the employer, while it is of no significance what part of the remaining group of dismissed employees will be constituted by those who leave on the basis of agreement of the parties. For instance, in a group of ten employees (which is a minimal limit of a "group dismissal" when there are more than 20 and fewer than 100 employees), there can be four such cases or even only one¹¹.

As far as the regulations referring to the change of employer are concerned, the basic non conformity consists in the fact that our law lacks the norm providing the employee who does not wish to continue employment relationship with the buyer of the company (or part of it), with a possibility of "objecting to their employment contract being transferred" together with the transfer of enterprise. It should be emphasised that such entitlement on the part of an employee of a company which is being taken over does not stem directly from the text of the directive, but it was formed by the European Court of Justice drawing on the basic principles of labour law, especially the principle of freedom of work whose expression is the freedom of an employee to choose their employer in the sense that they cannot be forced to work for an employer they do not accept. Thus, such entitlement constitutes an imperative element of the relevant Community regulation¹². According to our regulations, on the other hand, an employee who does not wish to work for the "new employer", is entitled to terminate the employment contract (even in fast track, without notice, informing about it seven days in advance), but only after the company (or its part) has been taken over by a different economic entity (art. 23-1, § 4 of the labour code). Hence, according to the formula of the regulation, such an employee is forced, against their will, to remain in an employment relationship with the new employer for the period of eight days at least. Let us add that the current version of art. 23-1

§ 4 of the labour code, in force since 1 January 2004 (adopted by means of the act of 14 November 2003 concerning the change of the labour code and several other acts; Journal of Law, no 213, item 2081), differs from the Community law more than the previous version, according to which an employee was entitled to terminate the employment relationship one month after having been informed about the future transfer. Thus, if the information about the planned transfer was delivered early enough, the termination of the employment relationship could take place before the realisation of the transfer.

Non-conformity of the Polish regulations with the Community ones concerning the matter of fixed term employment boils down to the fact that such type of employment regulated by the directive 99/70 is of wider application than employment on the basis of the “employment contract for a defined period of time” present in the Polish law, which the restrictions contained in the directive have been limited to by the Polish lawmakers (art. 25-1 of the labour code). Thus, in our law the restrictions included in the directive do not refer to another type of employment for a defined period of time, one realised on the basis of the “employment contract for the time of work execution.” According to the directive, on the other hand, fixed-term employment refers to such an employment contract which is binding for the two parties until the previously set calendar date or the realisation of a certain (objective) event or the completion of the work agreed to previously¹³. The last definition of fixed-term employment may naturally refer to the work that a given employee has been employed to carry out. Thus, “fixed-term employment” as understood by the above mentioned directive encompasses also employment on the basis of the “employment contract for the time work execution,” which constitutes a separate legal category in the Polish law (one of the four types of employment contracts, together with the open-ended employment contract, fixed-term employment contract and probationary employment contract) and is formally outside the regime of measures provided for by the directive¹⁴.

Transposition of the Community directives onto the national law (and the issue of interest to us here, concerning the shortcomings of the process and its faulty execution in the period provided for it) has been much written about, and the field of labour law does not boast any specific characteristic features in this respect and does not stand out here among other fields of law whose content is influenced by this particular source of Community law¹⁵. A rather common opinion holds that in practice, while applying the law, such non-conformances should be solved respecting the principle of giving priority to the Community law. Many authors, however, stipulate that the organ solving the dispute, which is especially valid for courts, cannot rule *contra legem*¹⁶. If an implementation norm is not compliant with the disposition of the relevant directive to such a degree that the contradiction cannot be interpreted, the national lawmaker is obliged to remove it by means of changing (or reversing) “their” regulation. Until the contradiction has been removed, the entity which suffered damage because of the faulty implementation of a given directive is entitled to claim indemnity from the Treasury¹⁷. Naturally, in such a case a member state is also exposed to a threat of the European Commission starting legal proceedings against it, with a possibility of directing a complaint to the European Court of Justice.

Being aware of the complex nature of the problem as such (whether the discrepancy between the directive and national law can be eliminated by means of proper interpretation or whether it is necessary to change or withdraw the national regulation(s)), I believe that the above mentioned non-conformity concerning the change of employer can be solved by means of proper interpretation of regulations, while in the other two cases (concerning group dismissals and the understanding of the concept of fixed-term employment) the intervention of the Polish lawmakers is essential. I accept the way of solving (in the course of interpretation of law) the first case of non-conformity following the example of the rulings of the European Court of Justice, quoted with no reservations in many academic papers¹⁸. The European Court of Justice, as it was mentioned above, referring to the

principle of freedom of work, ruled that an employee can object to “their employment relationship being taken over” by the purchaser of the company (or part of it) for which they worked when the transfer was taking place. Continuing this thought, we are entitled to reach the conclusion that, if the principle of freedom of work that the Court of Justice quoted is considered as a basic principle (right) and, thus, is valid in the legal order of every member state in a similar way as any primary legislation norm¹⁹, then part of the regulation of art. 23-1 § 4 of the labour code which does not comply with the above mentioned principle is of no application. It should be added that the same conclusion could be reached within the framework of the Polish labour law, since the principle of the freedom of work is also expressed in the Polish labour code (art. 11)²⁰.

Ruling the employee entitled to object to their employment relationship being transferred to the new owner of the company, generates problems concerning the existence of the employment relationship, should the employee make use of the right they are entitled to. The European Court of Justice did not take any position here, leaving the matter to be solved by the member states²¹.

And there are plenty of solutions of the kind. In Finland, for instance, a regulation was introduced providing the employee with the right to terminate the employment relationship on the day of transfer²². In Germany, the employee has the right (based on a clearly stated regulation) to object to his employment relationship being taken over, which results in the maintenance of the relationship with the alienator remaining the employer²³. In France, where the appropriate legal construction is mainly the effect of court decisions, the refusal on the part of the employee to continue the employment relationship with the transferee results in the cessation of the employment relationship, and if the refusal is based on a significant change of the working conditions, the employee is entitled to certain rights stemming from the dissolution of employment contract for reasons concerning the employer²⁴. In Poland, until the lawmakers introduces a proper regulation, one should perhaps apply art. 23-1 § 4 of the labour code, giving the employee the right to terminate the employment contract at a 7-day notice, provided they are informed about the transfer planned in due time, before the date of its realisation. In case of lack of proper information, the 7-day notice commitment would not be valid²⁵.

The conflict between the above mentioned Polish regulations, concerning group dismissals and employment for a defined period of time, and the relevant dispositions of the Community directives cannot be eliminated in the course of the appropriate interpretation of the laws because of the significantly different norms present in the Polish law and the lack of general rules on the basis of which the binding force of the Polish solutions contradicting the directives – as in the case of the change of employer – could be challenged. I believe that a change in our regulations concerning the matter is essential²⁶. For the time being, though, there is a greater threat of indemnity claims court proceedings connected with the regulations concerning fixed-term employment, especially that because of the formal limitation of the renewal of employment contracts to contracts for a defined period of time solely, one is almost encouraged to make use of the contract for the time of work execution²⁷.

Endnotes

1. This remark is naturally valid for other fields of law as well (according to the general meaning of W. Czapliński's discourse: *Priority is not Superiority*, "Rzeczpospolita," 6 September 2004.

2. Cf. e.g. M.M. Kenig-Witkowska (ed.): *Prawo Instytucjonalne Unii Europejskiej*, Warsaw, 2004, p. 235 and J. Barcz (ed.): *Prawo Unii Europejskiej: Zagadnienia Systemowe*, II edition, Warsaw, 2003, p. 245. The second publication emphasises the fact that the norms included in the law (the author does not clearly narrow down his discourse to primary legislation and ordinances, but it can be inferred from further argumentation – pp. 253-256), become automatically, from the very day of their coming into force, part of the legal order in the member states, together with the norms of national law.

3. Cf. Annex XII to the Accession Treaty of 16 April, 2003 (included in the selection of documents entitled *Traktat akcesyjny. Traktaty stanowiące podstawę Unii. Prawo polskie – dokumenty*, Wasaw, 2003, p. 207 onwards) and the ordinance of the Ministry of Economy and Labour of 26 May, 2004 concerning the range of limitations in the sphere of work carried out by foreigners in the Republic of Poland, *Journal of Law*, 2004, no 123, item 1293.

4. The issue is discussed in detail by L. Mitrus in the publication "Zasady zatrudniania Polaków w Unii Europejskiej w świetle traktatu akcesyjnego," *Praca i Zabezpieczenie Socjalne*, 2004, issue 5, p. 24 onwards.

5. Cf. e.g. S. Dudzik: "Zasada subsydiarności na tle obecnych przemian w Unii Europejskiej", *Przegląd Prawa Europejskiego* 1999, issue 2 (6), p. 20 onwards, and F. Emmert and M. Morawiecki: *Prawo Europejskie*, III edition, Warsaw-Breslau, 2001, p. 157 onwards.

6. It concerns the structure and amount of a remuneration, as remuneration as "element of labour relations" is mentioned in different regulations, e.g. in the ones concerning the duty of informing an employee about all the significant elements of an employment contract.. The basic principles of Community law, including social law and within its framework also the principles of labour law, are discussed in many publications; cf. J. Barcz (ed.): see above, p. 185 onwards; M. Herdegen: *Prawo europejskie*, Warsaw, 2004, p. 110 onwards; Z. Brodecki (ed.): *Zatrudnienie i ochrona socjalna*, Warsaw, 2004, pp. 118-119; A. M. Świątkowski: *Europejskie prawo socjalne*, volume I, Warsaw, 1998, pp.110-111.

8. Cf. H. Lewandowski: "Prawo do rokowań zbiorowych", in: "Europejska Karta Społeczna", *Biuletyn Centrum Uniwersytetu Warszawskiego oraz Ośrodka Informacji i Dokumentacji Rady Europy*, 1997, issue 1-2, pp. 46-53.

9. It met with the European Union's negative opinion: cf. M. Matey-Tyrowicz: "Europeizacja polskiego prawa pracy" in *System prawa RP w procesie europeizacji* (ed. M. Matey-Tyrowicz), Warsaw. 2002, p. 154.

10. I wrote about it in: "Wpływ prawa wspólnotowego (Unii Europejskiej) na polskie prawo pracy," in *Wpływ prawa wspólnotowego (Unii Europejskiej) na prawo wewnętrzne. French and Polish cases*, Warsaw, 2003, pp. 392, 394-395.

11. Many cases of non-conformance of the regulations of our act with the Community directive are discussed by Ł. Pisarczyk in his paper "Wpływ prawa wspólnotowego na kształt polskiej regulacji zwolnień zbiorowych," in *Europeizacja polskiego prawa pracy* (ed. W. Sanetra), Warsaw, 2004, p. 138 onwards.

12. I included a more extensive comment on the matter in the publication quoted in footnote 10, p. 399. Cf. also P. Rodière: *Droit social de L'Union Européenne*, 2-e éd., Paris, 2002, p. 402, and B. Teysnière: *Droit européen du travail*, 2-e éd., p. 231. As far as pronouncing the European Court of Justice case-law as a source of law is concerned, cf. M. Kruk: "System Źródła prawa we Wspólnotach Europejskich" in *Prawo na Zachodzie. Studia Źródła prawa w systemie demokratycznym*. (ed. W. Wołpiuk), Warsaw, 1992, p. 225.

13. According to the definition of a "defined period of time employee" contained in the social partners' agreement (clause no 3) which forms the content of the directive under discussion. The same concept of an "employment contract for a defined period of time" is included in the 91/383 directive concerning additional measures of labour protection of the employees employed for a defined period of time as well as those employed by temporary work agencies.

14. I do not include comments on the "probationary employment contract," as it performs a different function; probationary employment cannot be treated as the type of employment that the 99/70 directive refers to. Z. Hajn, however, seems to be treating the matter in a different way: "Elastyczność popytu na pracę w Polsce. Aspekty prawne" in *Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsce* (ed. E. Kryńska), Warsaw, 2003, p. 62.

15. A peculiarity of labour law is the fact that the implementation of directives in this field can take place in the course of agreement. The matter, however, remains outside of our area of interest.

16. Cf. S. Biernat: "Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich" in *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* (ed. C. Mik), Toruń, 1998, p. 123 onwards, especially 133-134, and B. Kurcz: *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków, 2004, pp. 175-177.

17. Cf. publications quoted in the previous footnote, especially B. Kurcz, pp. 204-205, and S. Biernat: "Prawo Unii Europejskiej a prawo państw członkowskich" in *Prawo Unii Europejskiej* (ed. J. Barcz), Warsaw, 2004, pp. 277-279. The aggrieved employee could not claim indemnity from their employer as the directive does not impose obligation on the entities that are not controlled by the state. However, it should be noted here that the European Court of Justice has started to give a wider interpretation to the concept of "state" and has started accepting claims of indemnity, directly drawing on the regulations of the directive, against organisational units constituting the "emanation of state", which applies to state as employer and to state or local government offices acting as employers, as well as, I believe, state enterprises and one-person Treasury companies.

18. See the publications quoted in footnote 12

19. Cf. for instance F. Emmert and T. Morawski: see above, pp.257-264; and Z. Brodecki (ed.): see above, pp. 117-118.

20. It has to be mentioned here that already on the basis of the first version of art. 23-1 (of 1989) of the labour code, which did not contain the prohibition of termination of an employment contract because of the transfer, A. Kijowski, drawing on the principle of freedom of work, claimed that the change of employer takes place ipso jure, unless the employee objects to the transfer of their employment relationship. Unfortunately, the author weakened his position slightly basing it on the "presumption of the employee's agreement" (see A. Kijowski: "Przejście zakładu pracy na inną osobę." *Praca i Zabezpieczenie Społeczne* 1991, issue 4, p. 54). An entirely different position, questioning the right of an employee to object to the transfer of their employment relationship to the new owner of the company, was taken by the Supreme Court and some of the representatives of its doctrine (see Ł. Pisarczyk: *Przejście zakładu pracy na innego pracodawcę*, Warsaw, 2002, pp.

110-112). A later publication of Pisarczyk (“Zmiany w przepisach dotyczących przejęcia zakładu pracy na innego pracodawcę.” *Praca i Zabezpieczenie Społeczne*, issue 7, p. 19) makes it clear that he has not changed his views even though a significant change of art. 23-1 § 4 of the labour code took place (by the act of 14 November, 2003). The change consisted in granting the employee the right to terminate the employment relationship, in a simplified way, only after the date of transfer (instead of after the information about the transfer, which should be delivered before the date of the transfer itself).

21. Cf. for instance Y. Viala: “Le maintien des contrats de travail en cas de transfert d’entreprise en droit allemand. Condition et conséquences essentielles,” *Droit Social*, 2005, issue 2, pp.208-210.

22. Quoting Pisarczyk: “Zmiana pracodawcy wskutek przejęcia zakładu pracy,” *Praca i Zabezpieczenie Społeczne* 2001, issue 7, p. 30 (footnote 20)

23. It is generally believed, though, that the maintenance of the employment relationship with the alienator as employer is only realistic in case of a transfer of part of the enterprise only, offering the employee the same or different job in the other part of the company (or another company belonging to the alienator). Otherwise, the employee making use of their right to object faces the risk of being dismissed for economic reasons; see Y. Viala, as above, pp. 209-210

24. Many publications testify to the consistent position of the French Court of Appeal in the matter; for instance Y. Viala, see above, and V. Ionescu: “Le droit d’opposition des salariés au transfert de leur contrat de travail: mythe ou réalité,” *Droit Social*, 2002, issue 5, p. 507 onwards; G. Couturier et J. E. Ray: “Auto-licenciement: dérives et revirement,” *Droit Social*, 2003, issue 9/10, p. 817 onwards, especially p. 819; Patrick Rémy: “Quelle signification donner au droit d’opposition du salarié au transfert de son contrat de travail? Réflexions sur le droit français à partir du droit allemand,” *Droit Social*, 2004, issue 2, p. 155 onwards.

25. I do not share A. Kijowski’s view expressed in the publication quoted in footnote 20, where he states that in such case the employee (who can no longer be employed by the previous employer, for instance because of the transfer of the entire enterprise) should be granted remuneration for the period of notice and severance pay (p. 54). In my opinion, the employee terminating their employment contract according to “general rules” should not be privileged in comparison with the one who does it in a situation clearly defined by the legal regulations.

26. It is worth stating here that in the project of the new labour code, prepared by the governmental committee for the codification of labour law, there is no mentioning of a separate type of employment contract for the time of the execution of work.

27. See J. Wratny: “Nietypowe formy zatrudnienia w perspektywie polskiego prawa pracy” in *Deregulacja polskiego rynku pracy* (ed. K. W. Frieske), Warsaw, 2003, p. 125.